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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

THERESA DUTCHUK, ANNALISA
HEPPNER, LIZ ORTIZ, RANNA WELLS,
NORMA JOHNSON, AND JANE DOE VI

Plaintiffs,

vs.

DAVID YESNER, UNIVERSITY OF
ALASKA BOARD OF REGENTS AND
UNIVERSITY OF ALASKA SYSTEM.

Defendants.

Case No.: 3:19-cv-00136-HRH

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANT
YESNER'S MOTION TO DISMISS
ALL CLAIMS AGAINST HIM BY LIZ
ORTIZ (FORMERLY "JANE DOE
III")**

1 **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT YESNER'S**
2 **MOTION TO DISMISS ALL CLAIMS AGAINST HIM BY LIZ ORTIZ**
3 **(FORMERLY "JANE DOE III")**

4 COME NOW, Plaintiffs, and file this Response in Opposition to Defendant
5 Yesner's Motion to Dismiss All Claims Against Him by Liz Ortiz (Formerly "Jane Doe
6 III") and would respectfully show this Court the following:

7 **I. FACTUAL BACKGROUND**

8 This action arises from Defendant University of Alaska's deliberately indifferent
9 response to the severe and long running sexual harassment of graduate students by
10 University of Alaska's professor and supervisor, Defendant David Yesner. Defendant
11 University of Alaska's failure to promptly and appropriately investigate and respond to
12 the harassment subjected Plaintiffs to retaliation and a hostile environment, effectively
13 denying them access to educational and professional opportunities. Further, Defendant
14 University of Alaska's employee, Defendant Yesner retaliated against Plaintiffs for
15 denying Defendant Yesner's sexual advances, which Defendant University of Alaska
16 failed to prevent or take action against even after the Plaintiffs complained of Defendant
17 Yesner's behavior and notified Defendant University of Alaska, once the actions had
18 started. This malicious and intentional conduct has subjected Plaintiffs to significant and
19 pervasive reputational damage and emotional distress, destroying their careers and
20 causing significant damage to their mental health. Their lives have been forever changed
21 by Defendants' actions.

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2 **II. STANDARD OF REVIEW**
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5 A 12(b)(6) motion should not be granted “unless it appears beyond a doubt that the
6 plaintiff can prove no set of facts in support of his claim which entitle him to relief.”
7 *Conley v. Gibson*, 355 U.S. 41, 44-46 (1957). The question before the Court in examining
8 a 12(b)(6) motion is whether the plaintiff’s complaint states any valid claim for relief. *Id.*
9 Since federal courts simply require “notice pleading,” the Court construes a plaintiff’s
10 pleading liberally, and lack of detail does not constitute a sufficient ground to dismiss a
11 complaint under Rule 12(b)(6). *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 11
12 1985). To survive a challenge under Alaska R. Civ. P. 12(b)(6), it is enough that the
13 complaint sets forth allegations of fact consistent with and appropriate to some
14 enforceable cause of action. *Kolodge v. State*, 757 P.2d 1024 (Alaska 1988). **A motion**
15 **to dismiss under rule 12(b)(6) is “viewed with disfavor and is rarely granted.”** *Id.*
16 The strict standard of review under rule 12(b)(6) has been summarized as follows: “The
17 question therefore is whether in the light most favorable to the plaintiff and with every
18 doubt resolved in his behalf, the complaint states any valid claim for relief.” CHARLES
19 A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE
20 § 1357, at 601 (1969); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 19
21 2000). When attacked pursuant to Rule 12(b)(6), well-pled allegations in a complaint
22 must be treated as true, and all reasonable inferences drawn in the plaintiff’s favor.
23 *Christie v. Standard Ins. Co.*, No. C 02-02520 WHA, 2002 U.S. Dist. LEXIS 22062 at *5
24 (N.D. Cal. July 19, 2002).

Plaintiff Liz Ortiz has more than stated a valid claim for relief and therefore Defendant Yesner's Motion to Dismiss should be denied in its entirety.

III. ARGUMENT AND AUTHORITIES

Defendant Yesner has argued that Plaintiff Ortiz has not pled a valid claim for assault, battery or intentional infliction of emotional distress or “(sexual harassment for that matter).”

To date, Plaintiffs have removed intentional infliction of emotional distress claims from the Complaint and Plaintiff Ortiz is not asserting a battery claim against Defendant Yesner. Therefore, those arguments are now moot. Therefore, the only claim left that Plaintiff will address in this Response is assault and sexual harassment.

It is axiomatic that a Motion to Dismiss is to be judged by the four corners of the Complaint and a court is limited to consideration of the Complaint's allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 674, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009); *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288–90 (11th Cir. 2010). At the Motion to Dismiss stage, the “court must take the allegations as true, no matter how skeptical the court may be.” *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009). Defendant’s arguments for the dismissal of Plaintiff’s claim for assault based on the fact that it is inadequately pled fly in the face of the core principles for evaluating a Motion to Dismiss. Defendant is using the wrong procedural vehicle in a motion to dismiss to attack the merits of Plaintiff’s claims. That tactic is improper at the pleadings stage.

Regardless, Plaintiff has stated valid claims for assault (and sexual harassment for that matter).

1 Furthermore, Plaintiff's claims are timely under the statute of limitations as
2 Plaintiff asserted her claims within two years of the incidents.

3 **A. Statute of Limitations.**

4 Plaintiff has timely pled her claims for assault and sexual harassment¹ as her
5 claims occurred after May 14, 2017 in October 2017 and later and the original Complaint
6 was filed within two years of the incident on May 15, 2019. Defendant concedes this
7 point.

8 Alaska Statute 09.10.070 reads as follows:

9 **Actions for torts, for injury to personal property, for certain statutory
10 liabilities, and against peace officers and coroners to be brought in two
11 years.**

12 (a) Except as otherwise provided by law, a person may not bring an action (1)
13 for libel, slander, assault, battery, seduction, or false imprisonment, (2) for
14 personal injury or death, or injury to the rights of another not arising on
15 contract and not specifically provided otherwise; (3) for taking, detaining, or
16 injuring personal property, including an action for its specific recovery; (4)
17 upon a statute for a forfeiture or penalty to the state; or (5) upon a liability
18 created by statute, other than a penalty or forfeiture; unless the action is
19 commenced within two years of the accrual of the cause of action.

20 Because Plaintiff has brought her claims within two years of the cause of
21 action, her claims are timely.

22 The lascivious breast staring which Plaintiff alleges in the latest Complaint
23 occurred after May 14, 2017. Defendant Yesner would stare intently at Plaintiff's breasts
24 during the geology classes in the Fall of 2017 and during other interactions.

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¹ The claim of sexual harassment has been categorized as personal injury by the 9th Circuit and Alaska courts. See
Mahan v. Arctic Catering, Inc., 133 P.3d 655, 658 (Alaska 2006).

1 B. Assault.

2 Plaintiff has stated a valid claim for assault.

3 As Defendant has cited in his Motion, Restatement (Second) of Torts, § 21, which
4 has been referred to by Alaska courts, states as follows:

5 (1) An actor is subject to liability to another for assault if

6 (a) he acts intending to cause a harmful or offensive contact with the person of the
7 other or a third person, or an imminent apprehension of such a contact, and

8 (b) the other is thereby put in such imminent apprehension.

9 (2) An action which is not done with the intention stated in Subsection (1,a) does
10 not make the actor liable to the other for an apprehension caused thereby although
11 the act involves an unreasonable risk of causing it and, therefore, would be
12 negligent or reckless if the risk threatened bodily harm.

13 Restat 2d of Torts, § 21.

14 Alaska Stat. Sec. 11.41.230 states:

15 Assault in the fourth degree.

16 (a) A person commits the crime of assault in the fourth degree if

17 (1) that person recklessly causes physical injury to another person;
18 (2) with criminal negligence that person causes physical injury to another
19 person by means of a dangerous instrument; or

20 **(3) by words or other conduct that person recklessly places another
21 person in fear of imminent physical injury.**

22 No physical contact is required for an assault claim. Physical injury is not a
23 required element of either assault or battery. The tort of assault is complete when the
24 anticipation of harm occurs. *Fuentes v. Cal. Dep't of Corr.*, No. 1:17-cv-00745-EPG
25 (PC), 2018 U.S. Dist. LEXIS 52132 at *9-10 (E.D. Cal. Mar. 28, 2018). “An actor is
26 subject to liability to another for battery if the actor intentionally engages in an act that

results in harmful or offensive contact with the person of another.” *Mendez v. City of Scottsdale*, No. CV-12-285-PHX-GMS, 2012 U.S. Dist. LEXIS 126591 at *17 (D. Ariz. Sep. 6, 2012). “[A] claim for common-law assault requires an allegation that the defendant acted intentionally to cause a harmful or offensive contact and another person is placed in imminent apprehension of the contact.” *Id.* “The two claims are the same except that assault does not require the offensive touching or contact.” *Id.*

Defendant's conduct placed Plaintiff in fear of imminent physical injury. As Plaintiffs' latest Complaint alleges, Defendant Yesner acted intending to cause a harmful or offensive contact with Plaintiff Ortiz or at the very least, an imminent apprehension of such contact. Plaintiff was put in such imminent apprehension. Contrary to Defendant's statements, Yesner did not merely stand in the doorway and enter the room without doing anything. That statement is misleading and false. The latest Complaint alleges:

One particularly unsettling incident occurred sometime in October 2017 on campus when Plaintiff Ortiz was alone in a classroom performing a necropsy of a bear for one of her courses. While she was performing work on the specimen, Defendant Yesner suddenly appeared in the doorway, intensely staring at Plaintiff and standing in silence just watching her. Plaintiff was frozen with fear. Defendant Yesner had positioned himself in a way so that Plaintiff's egress from the room was completely blocked. She had no way out. Plaintiff managed to position herself so that the table was in between Defendant and herself. Within a few minutes, Defendant Yesner began to walk slowly towards Plaintiff in a threatening manner, still without saying anything. In an attempt to protect herself, Plaintiff chose to jump over the bear carcass on the floor instead of going around the table so she could be out of arms reach from Defendant. Plaintiff made a quick exit out of the room, running as far away as she could down the halls. The incident was branded into Plaintiff's memory, causing significant distress to this day.²

² See First Amended Complaint (Dkt. 36), ¶ 94 on file with this Court.

1 To add insult to injury, Defendant knew Plaintiff would be alone in the classroom,
2 vulnerable and defenseless. The power imbalance was very much in play as Defendant
3 was a renowned professor and a candidate for emeritus professor at the time of the
4 incident. His reputation and standing within the archaeology community was very high.
5 He had significant influence in the community and could make or break a student's career
6 with a recommendation or lack thereof. He had blocked the exit in such a way that
7 Plaintiff felt trapped. He charged towards Plaintiff in a threatening manner, staring at
8 Plaintiff intensely. Yesner caused Plaintiff so much fear and distress that she was forced
9 to actually jump over the bear carcass and dash out of the room in order to avoid him
10 harming her. These are not actions one would take if she did not believe she was in
11 danger. These are actions taken by someone who is afraid for her safety and the evidence
12 will show this to be true. Similarly, the actions taken by Defendant Yesner were ones
13 intended to cause harmful contact and put the other person in imminent apprehension of
14 such contact. Defendant has not cited to any case that holds that Defendant's actions as
15 described above do not constitute assault.
16

17 Due to Defendant's actions, Plaintiff has suffered significant mental trauma that
18 continues to this day. Plaintiff is currently seeking counseling. She has experienced
19 debilitating panic attacks as well as anxiety and major depression from which she may
20 never recover.

21 Plaintiff has sufficiently pled a claim for assault. Defendant's Motion is meritless
22 and must be denied.

23

B. Sexual Harassment.

1 Defendant certainly engaged in actions of a sexual nature that constitutes sexual
2 harassment. Plaintiff pled in the Complaint that Defendant would stare lasciviously at her
3 breasts and make inappropriate comments as he sat behind her in geology classes.
4

5 Defendant's Motion should be denied.

6 **C. Plaintiff should be given leave to replead if the Court dismisses any of her
7 claims.**

8 Although Plaintiff is confident that the claims Defendant Yesner argues should be
9 dismissed state a valid claim under the applicable law, if this Court should dismiss any of
10 the claims, Plaintiff would respectfully ask that she be given leave to re-plead any of
11 them. Leave is particularly appropriate as the crux of most of Defendant's arguments
12 center around deficiencies in pleading sufficient facts in support of certain claims.
13 Generally, leave to amend under Federal Rule of Civil Procedure 15(a) is given freely.
14 *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Saewitz v. Lexington Ins. Co.*, 133 F. App'x
15 695, 699 (11th Cir. 2005) (*per curiam*).

16 **IV. CONCLUSION AND PRAYER**

17 For the reasons stated above, Liz Ortiz's claims should be upheld and Defendant
18 Yesner's Motion to Dismiss should be denied in its entirety. Plaintiff has properly pled
19 the claim of assault (and sexual harassment for that matter). In the alternative, Plaintiff
20 respectfully asks that Plaintiff be afforded the opportunity to amend the pleading if the
21 Court so orders. A motion to dismiss is a harsh measure that abrogates Plaintiff's rights to
22 due process of law in the courts and should be disfavored. Plaintiff seeks all other relief
23 to which Plaintiff may be entitled.
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1 DATED: October 7, 2019.
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4 Respectfully submitted,
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6 By: /s/ Cornelia Brandfield-Harvey
7 Anthony G. Buzbee
8 (*Pro Hac Vice Admission Pending*)
9 Attorney in Charge
10 Texas Bar No. 24001820
11 Federal Bar No. 22679
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30 **ATTORNEYS FOR PLAINTIFFS**

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2 **CERTIFICATE OF SERVICE**
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5 I hereby certify that on October 7, 2019 I filed a true and correct copy of the
6 foregoing document with the Clerk of the Court for the United States District Court –
7 District of Alaska by using the CM/ECF system. Participants in Case No. 3:19-cv-00136-
8 HRH who are registered CM/ECF users will be served by the CM/ECF system.
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11 */s/ Cornelia Brandfield-Harvey*
12 Cornelia Brandfield-Harvey
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